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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GABINO SANCHEZ, on behalf of himself, FLSA Collective Plaintiffs and the Class,

Plaintiff,

-v-

JMP VENTURES, L.L.C., d/b/a Harry's Italian Hip at Murray Street, L.L.C., Harry's Italian, and Harry's Italian, HIP at RC, L.L.C., et al.,

Defendants.

13 Civ. 7264 (KBF)

MEMORANDUM DECISION & ORDER

KATHERINE B. FORREST, District Judge:

On October 15, 2013, plaintiff brought this action under the Fair Labor Standards Act ("FLSA") and New York Labor Laws for the alleged failure of defendants to pay the applicable minimum wage and to pay overtime for hours worked in excess of forty hours per week. (Compl. ¶¶ 49-50, 59-60, ECF No. 1.) On December 20, 2013, plaintiff timely moved to conditionally certify a collective action under 29 U.S.C. § 216(b). (ECF No. 14.) In support of his motion, plaintiff submitted a four and a half page declaration by himself. (ECF No. 16.) Defendants opposed the motion on January 7, 2014, and the motion became fully briefed on January 16, 2014. (ECF Nos. 17-19.)

For the reasons set forth below, plaintiff's motion is DENIED.

## DISCUSSION

Section 216(b) of the FLSA authorizes employees to maintain collective actions where they are "similarly situated" with respect to the alleged violations of the FLSA. 29 U.S.C. § 216(b); Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010). Similarly situated employees must "opt in" to an action by filing a "consent in writing to become . . . a party." 29 U.S.C. § 216(b).

Certification of a "collective action" is a two-step process in the Second Circuit. See Myers, 624 F.3d at 554–55. At the first step (conditional certification), the Court simply authorizes notice to be sent to potential similarly situated plaintiffs. Id. at 555. Plaintiffs bear the light burden of making a "modest factual showing" that the named initial plaintiffs and the potential opt-in plaintiffs "together were victims of a common policy or plan that violated the law." Id. (quoting Hoffman v. Sbarro, Inc., 982 F. Supp. 249, 261 (S.D.N.Y. 1997)).

At the second step, "the district court will, on a fuller record, determine whether a so-called 'collective action' may go forward by determining whether the plaintiffs who have opted in are in fact 'similarly situated' to the named plaintiffs." Myers, 624 F.3d at 555. Defendants may then move for decertification if, after additional discovery, the record shows that the opt-in plaintiffs are not, in fact, similarly situated to the named plaintiffs. Id.

Nevertheless, while a plaintiff's "burden of proof is low, it is not non-existent—'certification is not automatic.'" Romero v. H.B. Auto. Grp., Inc., No. 11 Civ. 386 (CM), 2012 WL 1514810, at *10 (S.D.N.Y. May 1, 2012) (internal quotation marks omitted). Even at the conditional certification stage, a plaintiff's burden under § 216(b) "cannot be satisfied simply by unsupported assertions," Myers, 624 F.3d at 555 (internal quotation marks omitted), or with "conclusory allegations." Morales v. Plantworks, Inc., No. 05 Civ. 2349 (DC), 2006 WL 278154, at *3 (Feb. 2, 2006).

Though plaintiff correctly notes that the bar for conditional certification of a collective action under the FLSA is low, it is not this low. Plaintiff seeks to conditionally certify a class of "all tipped employees, including delivery persons, bussers, runners, waiters and bartenders" employed by defendants within the last three years at any of the three "Harry's Italian Restaurants." (Mem. at 1-2, ECF No. 15.) The factual record supporting this motion, limited to plaintiff's affidavit, is insufficient to support even an inference that a common policy or plan that violated the law existed with respect to this variety of potential opt-in plaintiff.

According to his affidavit, plaintiff worked solely as a delivery person at two of the three restaurants that are defendants in this action, for a total of approximately seven months in 2012—four months at the 2 Gold Street location and three months at the 225 Murray Street location. (Sanchez Decl. ¶ 1, ECF No. 16.) Plaintiff has not worked for defendants since September 13, 2012. (Id. ¶ 1.) With respect to the third location, at 30 Rockefeller Plaza, plaintiff states that he has been sent to the restaurant to pick up supplies and inventory, has seen the manager of the 30 Rockefeller Plaza pick up supplies and inventory from the other locations, and has "witness that the employees were interchangeable" among the three restaurants. (Id. ¶ 2.)

Plaintiff alleges he regularly worked 54 hours per week at the 2 Gold Street location and 42 hours per week at the 225 Murray Street location, and that he was paid neither the minimum wage nor overtime wages as required by the FLSA. (Id. ¶¶ 3-4, 6.) He repeatedly states, in substance, that these policies to which he was subjected in his seven months employed by defendants were the "common practice" at all Harry's Italian Restaurants since each restaurant's inception based on "observations" and "conversations" with other employees (whose first names he lists). (Id. ¶¶ 5, 7-15.)

Plaintiff does not, however, provide any detail as to a single such observation or conversation. As a result, the Court does not know where or when these observations or conversations occurred, which is critical in order for the Court to determine the appropriate scope of the proposed class and notice process.[1] Instead, the Court is left with a list of generalized allegations that have been molded into a declaration which reads similarly to the complaint. These are precisely the kind of unsupported assertions and conclusory allegations that courts in this District have found to be insufficient to conditionally certify a class under § 216(b). Cf. Ikikhueme v. CulinArt, Inc., No. 13 Civ. 293 (JMF), 2013 WL 2395020, at *2-3 (S.D.N.Y. June 3, 2013) (denying conditional certification when plaintiff offered only a single declaration from himself and otherwise relied on "unsupported assertions").

[1] The Court notes that plaintiff's personal observations alone would only appear to cover seven months (split between two of the three restaurants) of the three-year period for which he seeks conditional certification.

The Court does not hold that no class may be properly conditionally certified in this action. Conditional certification of the class proposed by plaintiffs—a class of all tipped employees, at three restaurants, over a three-year period—is not supported by plaintiff's declaration as submitted. The notice and opt-in process outlined by the FLSA is not a discovery device to determine whether conditional certification is appropriate. More is required under the law, even at the first stage of the conditional certification process. See Myers, 624 F.3d at 555

**CONCLUSION**

For the reasons set forth above, plaintiff's motion for conditional certification pursuant to 29 U.S.C. § 216(b) is DENIED.

The Clerk of Court is directed to terminate the motion at ECF No. 14.

SO ORDERED.

Dated: New York, New York
January 27, 2014

K B. Forrest

KATHERINE B. FORREST
United States District Judge